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No. 408

In the

Supreme Court of the United States

OCTOBER TERM, 1968

SAM LAWRENCE NUGARA,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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To The Honorable, The Chief Justice And Associate Justices Of The Supreme Court Of Illinois:

The Petitioner, Sam Lawrence Nugara, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Illinois, affirming the judgment of conviction of attempted burglary in violation of Chapter 38, Section 8-4 of the Illinois Revised Statutes 1963, in the Circuit Court, Criminal Division of Cook County, Illinois.

OPINION BELOW

The opinion of the Supreme Court of Illinois is not yet officially reported. It is printed in the appendix to this Petition (App. 1a-7a).

JURISDICTION

The opinion of the Supreme Court of Illinois was filed on March 28, 1968 (App. 1a-7a). A timely Petition for Rehearing was denied on May 27, 1968 (App. 9a). This Petition for Certiorari is filed within 90 days of the final judgment herein. The jurisdiction of this court is invoked under 28 U.S.C. Section 1557(3).

QUESTIONS PRESENTED

1. Is the decision of the Illinois Supreme Court in this case in conflict with this Court's decision in *Preston* v. *United States*, 376 U.S. 364?

2. Has the Illinois Supreme Court misapplied the decision of this Court in *Cooper* v. *California*, 386 U.S. 58, where there exists no state law directing seizure and providing for forfeiture, nor any provision establishing a claim of prior right to possession in property in the sovereign?

STATEMENT OF THE CASE

On April 13, 1966, an indictment was returned charging this Petitioner, together with one Shubmehl, with attempted burglary and possession of burglary tools, both alleged offenses having occurred on November 7, 1964 (Abs. 1-2). On May 23, 1966, the co-defendant Shubmehl moved to suppress as evidence certain matters and things taken from a car under his control on or about said November 7 (Abs. 8). A hearing was had on the motion that same day (Abs. 9-22) and denied (Abs. 22), and the cause proceeded to immediate trial (Abs. 23-68). After the trial, the jury returned a verdict as to this Petitioner of guilty on Count One, and not guilty on Count Two (Abs. 3), on which verdict judgment entered (Abs. 6).

Post trial motions for Directed Verdict and for New Trial and in the alternative in arrest of judgment were filed and denied on June 8, 1966 (Abs. 3-7), when Petitioner was sentenced to a term of one to five years in the penitentiary. On July 7, 1966, this Petitioner filed his Notice of Appeal to the Illinois Appellate Court for the First District (Abs. 9).

Later, in response to an informal suggestion by that Court noting that a constitutional question was involved, this Petitioner moved the Illinois Appellate Court to transfer the cause stating therefor the principal ground:

> "1. These causes involve, inter alia, whether prior to a search without a warrant, not incident to arrest, the victims of the search must be made aware of their constitutional rights under the Fourth Amendment to the Constitution of the United States and under Article 2, Section 6 of the Constitution of the State of Illinois, and whether an intelligent and valid consent to search may be given when the victims have not been apprised of their constitutional right to withhold consent."

The motion to transfer pointed out that the question had not yet been decided by the Illinois Supreme Court and that federal courts were in apparent conflict with State's Courts on this subject of apprisal of rights being a necessary requirement to effective consent, citing, *inter alia, United States* v. *Nikrasch,* 7 Cir., 367 F. 2d 740; *United States* v. *Blalock,* E.D. Pa., 255 F. Supp. 268 as against *State* v. *Forney,* 150 N.W. 2d 915; *State* v. *McCarty,* 427 Pa. 2d 616; *People* v. *Chaddock,* 57 Cal. Rep. 582, and *People* v. *Roberts,* 55 Cal. Rep. 62.

A resolution of the question, hereinabove explained, was found, by the Supreme Court of Illinois, not to be necessary to the decision here, that Court finding the search of

an automobile that occurred in this case, was authorized under this court's decision in *Cooper* v. *California*, 386 U.S. 58, 17 L.Ed. 2d, 730, 87 S.Ct. 788. (App. 3a-4a)

The facts as recited by the Supreme Court of Illinois are as follows:

> ". . . [at] approximately 3:00 A.M., on November 7, 1964, Chicago police officers Wodnicki, Brooks and McCarthy, while patrolling in their unmarked car, observed the defendants standing, one in front and the other in the recessed entranceway of the Neumode Hosiery Shop at 54 West Madison Street in Chicago. Wodnicki testified that he jumped from the car as it slowed and ran to the entranceway where he saw Shubmehl facing the door of the hosiery shop with a screwdriver in his left hand, the tip of which was inserted into the part of the door where the lock cylinder had been removed. He promptly arrested Shubmehl, noticing, upon closer inspection, that there were striation marks and indentations on the casing of the cylinder lock and that although the cylinder was missing the door could not be opened until the bolt of the lock was moved. He conducted a brief search of the area around the door for the missing cylinder but failed to find it. In the meantime his fellow officers had arrested Nugara who had fled from in front of the entranceway to and down an adjacent stairway.
>
> Both defendants were taken to Area One Burglary Unit Headquarters located at 56th and Cottage Grove. Enroute and upon arrival at the police station Wodnicki asked Shubmehl whether he had a car parked at the scene and each time Shubmehl denied having one. Wodnicki further testified, however, that he later said to Shubmehl, "You may as well tell us if you have a car, if you are driving one, because we'll find out. If the car is out on the street it will be towed, why go through the expense of having the car reclaimed. We'll take the car off the street, we'll reclaim the car and you can pick it up", and that Shubmehl then ad-

mitted having a '64 Ford with Michigan license plates parked south of Madison on Dearborn and gave him the keys. He stated that he then asked, "Do you have anything in the car?" to which Shubmehl replied, "No", and that he inquired further, saying, "You don't mind if we look around the car?" and Shubmehl answered: "No, go ahead, look through the car." Thereafter, he returned to the Dearborn-Madison area, found the car, opened the trunk, and discovered a claw hammer, two screwdrivers and a pair of pliers.

These items were admitted into evidence at trial following denial of Shubmehl's motion to suppress wherein he denied giving any authorization to police officers to search his car. The remainder of the State's case consisted of the testimony of the arresting officers as well as testimony concerning the condition of the door of the hosiery shop at closing time on the evening before the arrest and the condition thereafter, and the screwdriver and bent nail files taken from Shubmehl's person upon arrest." (App. 1a-3a)

Relative to the point, that gives rise to this Petition (the failure to follow *Preston* and the misapplication of *Cooper*) the Illinois Supreme Court in asserted reliance on *Cooper* v. *California* 386 U.S. 58, determined the issue of the search as follows:

"In support of his contention that the burglary tools found in the trunk of his car should have been suppressed, Shubmehl argues that the search which uncovered these items was unlawful because it was not incident to his arrest, citing *Preston* v. *United States*, 376 U.S. 364, 11 L.Ed. 2d 777, 84 S.Ct. 881, nor knowingly consented to by him. We need not go beyond the first of these arguments to determine that the ultimate contention of error is unfounded and that the search was reasonable and not in violation of Shubmehl's rights. In the recent cases of *People* v. *Brown*, 38 Ill. 2d 353, and *People* v. *Jones*, 38 Ill. 2d 427, we con-

sidered the scope of *Preston* and similar cases in the light of *Cooper* v. *California*, 386 U.S. 58, 17 L.Ed. 2d 730, 87 S.Ct. 788, wherein a search of the glove compartment of an automobile which had been impounded by the police was upheld despite the fact that the search occurred one week after the defendant had been arrested for a narcotics violation. On the strength of *Cooper* we felt free to consider the lawfulness of a search of an automobile even though it occurred after the owner was arrested and taken into custody, factors which a majority of this court, under the compulsion of *Preston*, had considered as invalidating the search *per se*. (See *People* v. *Lewis*, 34 Ill. 2d 211, 215.) Accordingly, in *Brown* and *Jones* we proceeded to examine all the facts surrounding the arrest and search in making our determination of its legality. 38 Ill. 2d at 358; at 431.

Using this same approach here, we note that Shubmehl's car was parked in the immediate proximity of the hosiery shop and had admittedly been used to transport him and his burglary tools to that location. Thus, in the instant case, as in *Cooper*, there is a close connection between the reason the defendant was arrested, *i.e.* attempted burglary of the shop, possession of burglary tools, and the reason his car was impounded and searched, *i.e.* to find additional tools or the missing lock cylinder. In view of these facts, we find that the search of Shubmehl's automobile was reasonable, notwithstanding the time which elapsed between his arrest and the search. Therefore, the admission of the seized items at trial was proper." (App. 3a-4a)

REASONS FOR GRANTING THE WRIT

This Court should issue its Writ of Certiorari for the following reasons:

1. The Supreme Court of Illinois has determined a Fourth Amendment question here in a manner completely

in discord with this Court's decision in *Preston* v. *United States*, 376 U.S. 364, 11 L.Ed. 2d 777, 84 S.Ct. 881.

2. The Supreme Court of Illinois has missapplied this Court's decision in *Cooper* v. *California*, 386 U.S. 58, 17 L.Ed. 2d 730, 87 S.Ct. 788, where there is no claim of prior right to possession in the sovereign, i.e. forfeiture.

3. This decision of the Illinois Supreme Court is in conflict with a decision of the United States Court of Appeals in the same area, *United States* v. *Harvey*, 7 Cir., ... F. 2d ....., No. 15863, decided July 5, 1968.

This case very closely approximates the facts presented that gave rise to this Court's decision in *Preston* v. *United States*, 378 U.S. 364, except to the extent that this presents a more aggravated situation. In *Preston*, the defendants were picked up because they looked suspicious and because, on being questioned, they gave evasive and unsatisfactory answers. The validity of the arrest was determined not necessary to decision. Their automobile was appropriated at the time of the arrest and, after their delivery to the police station, towed away to a garage.

In this case, the petitioner and his companion were arrested on what later developed to be a charge of attempted burglary, were taken from the place of arrest to First Area Headquarters at 57th and Cottage Grove in Chicago, Illinois, a distance of not less than 8 miles from the scene of the arrest. It is undisputed that all during the ride, petitioner's companion answered in the negative to repeated questioning as to whether or not he had a car. Ultimately when he arrived at Area One Headquarters, he was prompted to tell the location of the car by a representation to him that "you may just as well tell us because the car will show up in a matter of days. We will have to tow it, it will be that much more complicated for you to get it

back." (Abs. 16) Thereupon, petitioner's companion told the location of the car and how it could be identified.

Proceeding to the location of the car, and with the keys in hand, a thorough search was made of the car, and in the trunk was found a claw hammer and two screwdrivers.

At this juncture the only distinction between *Preston* and this case is that, in *Preston,* the car was immediately appropriated at the time of the arrest, whereas in this case, no interval of less than one hour would be feasible before the apprehension of the car.

We thus have the accused under arrest and in custody and a search made in another place. *Preston* speaks quite firmly that such a search is not incident to any arrest. 376 U.S. at 367. Peculiarily appropriate, considering the similarity of circumstances is the ruling of this Court.

> "The search of the car was not undertaken until petitioner and his companions had been arrested and taken in custody to the police station and the car had been towed to the garage. At this point there was no danger that any of the men arrested could have used any weapons in the car or could have destroyed any evidence of a crime—assuming that there are articles which can be the "fruits" or "implements" of the crime of vagrancy. Cf. United States v. Jeffers, 342 U.S. 48, 51-52, 72 S.Ct. 93, 95, 96 L.Ed. 59 (1951). Nor, since the men were under arrest at the police station and the car was in police custody at a garage, was there any danger that the car would be moved out of the locality or jurisdiction. See Carroll v. United States, supra, 267 U.S. at 153, 45 S.Ct. at 285, 69 L.Ed. 543. We think that the search was too remote in time or place to have been made as incidental to the arrest and conclude, therefore, that the search of the car without a warrant failed to meet the test of reasonableness under the Fourth Amendment, rendering the evidence obtained as a result of the search inadmissible." *Preston* v. *United States,* 376 U.S. 364 at 368.

Under the ruling in *Preston,* the Illinois Supreme Court would clearly have been bound to reverse this conviction, and rule the evidence obtained as a result of the search of the car violative of the Fourth Amendment to the Constitution of the United States.

As in *Preston,* there was no reason for belief that the car herein was stolen, nor did the State of Illinois even advance such a suggestion. As in *Preston,* no claim was made that the police had the authority to hold the car as the fruit of a crime and, "The search was therefore to be treated as though the car was in its owner or agents possession, safe from intrusion by the police or anyone else." *Cooper* v. *State of California,* 386 U.S. 58, 60.

The Supreme Court of Illinois noted this Petitioner's reliance on *Preston,* but in no manner attempted to reconcile its decision here with the decision in the *Preston* case. Instead, it riveted its attention on this Court's decision in *Cooper* v. *State of California,* 386 U.S. 58, which it proposes as standing for the proposition that the totality of the evidence in this case allows the inference that Petitioner and his companion approached the locality of the attempted burglary in the car and carrying the tools appropriate to a burglary attempt, and that, therefore, there was a relationship between the use of the car and the crime of which they were convicted, search without warrant, even if not incident to arrest, is permitted.

In *Cooper,* the Petitioner's vehicle had been used to carry on possession and transportation of narcotics. Under Section 11611 of the California Health and Safety Code such a car was subject to seizure and could be held as evidence until a forfeiture could be declared or a release ordered. While being held "as evidence" pending the forfeiture proceeding, the car was searched and evidence

found therein was used against Cooper on trial. Under the circumstances, with the evidence showing the car being used for the facilitation of the possession of the narcotics, the superior right of the sovereign interposes, and the sovereign has a claim of right equal, at least, to that of a person in the position of Cooper. It is basic that on forfeited property, property interest exists only in the sovereign. The forfeiture of a vehicle, such as that in the *Cooper* case, is recognized in Illinois, as well as in California (Chapter 38, Section 22-26, Illinois Revised Statutes). There is no comparable statute relating to the "facilitation" of the crime of burglary. There is no basis on which the sovereign State of Illinois could claim the right of possession, or superior interest, in the vehicle. *Cooper* is just not applicable, and the distinction between a case such as this and the *Cooper* decision was noted by the main opinion in the *Cooper* case.

> "It was not suggested that this was done other than for Preston's convenience or that the police had any right to impound the car and keep it from Preston or whomever he might send for it. The fact that the police had custody of Preston's car was totally unrelated to the vagrancy charge for which they arrested him." *Cooper* v. *State of California*, 386 U.S. at 61.

The vigorous dissent in *Cooper* anticipated a misunderstanding of the main decision, and an extension to a case such as this, with almost clairvoyance.

> "I think, however, it states a healthy rule, protecting the zone of privacy of the individual as prescribed by the Fourth Amendment. These days police often take possession of cars, towing them away when improperly parked. Those cars are "validly" held by the police. Yet if they can be searched without a warrant, the precincts of the individual are invaded and the barriers to privacy breached. Unless the search is

> incident to an arrest, I would insist that the police obtain a warrant to search a man's car just as they must do when they search his home." *Cooper* v. *State of California,* 386 U.S. 58, 65.

We submit that *Cooper* stands for only the proposition that it approves an automobile search where by statute an automobile may be seized and impounded for the purpose of forfeiture as it relates to the transportation of contraband, narcotics, alcohol and unregistered firearms, and that the search thereafter is not unreasonable. It was intended to go no farther than to recognize the right of a sovereign in a vehicle subject to forfeiture to the sovereign under local or federal law. We submit that, unfortunately *Cooper* has, by the Supreme Court of Illinois, been extended beyond its intended and express purpose, and the apprehensions of the dissenters has reached fruition in this cause.

In a very recent decision (*United States* v. *Harvey,* 7 Cir., ... F. 2d ....., No. 15863, decided July 5, 1968), the United States Court of Appeals in the self same area as the Supreme Court of Illinois has correctly interpreted the *Cooper* doctrine and its distinction from *Preston.* There two Chicago Police Officers received information that Harvey was wanted for investigation in connection with an armed robbery that happened on the south side of Chicago, and with the information at hand, the Chicago Police Officers proceeded to an address given for Harvey in the bulletin. They there observed a car parked at the curb and kept it under surveillance until they saw Harvey enter the vehicle, which vehicle they curbed shortly thereafter. They arrested Harvey and searched his car fruitlessly. After taking him to the police station and booking him, they decided that a second search would be advisable, the car then being impounded by the Chicago Police. The second search revealed contraband.

On a Motion to Suppress, both *Preston* and *Cooper* were submitted to the Court, respectively by the Defendant and the United States. The thrust of the Seventh Circuit decision in *Harvey* gave meaning to both decisions of this Court, *Preston* and *Cooper*. In finding the search unreasonable, that court said:

> "We believe that the instant case is controlled by *Preston*. There is no question that Harvey was under arrest and in custody when his vehicle was searched at the police station. The search was not necessary, therefore, to protect the officers or to prevent the destruction of evidence since neither Harvey nor anyone associated with him had any control over the vehicle or its contents. Although the listing of justifications for a warrantless search in *Preston* was merely illustrative, the Government has suggested no additional justification to sustain the search in the instant case. Once Harvey was arrested and in custody, the search 'made at another place, without a warrant, . . [was] simply not incident to the arrest.' *Preston* v. *United States, supra* at 367. *United States* v. *Nikrasch*, 367 F.2d 740 (7th Cir. 1966).
>
> "Our conclusion that the search in the instant case was unreasonable is not affected by the decision in *Cooper* v. *California*, 386 U.S. 58 (1967), in which the Supreme Court distinguished *Preston*. Although the search of the vehicle in *Cooper* (concededly not incidental) was conducted a week after the defendant's arrest, the vehicle itself was being held by the police pursuant to a state law as evidence until a forfeiture proceeding. As the Supreme Court said in *Cooper*, 'This case is neither *Preston* nor controlled by it.' 386 at 61.
>
> "Since the search of Harvey's vehicle at the police station by the local police officers was not reasonable,

the district court erred in denying Harvey's motion to suppress the evidence obtained as a result of that search." *(United States of America* v. *Harvey,* 7th Cir., ... F. 2d ....., No. 15863, decided July 5, 1968, pgs. 4-6)

We submit this case too, is controlled by *Preston;* that *Cooper* (there being no claim of right or title in the automobile of the sovereign under statute) is inapplicable and improperly applied; and, that the Seventh Circuit, in this same area, has properly distinguished the two cases emanating from this Court.

The erroneous interpretation of *Cooper* as promulgated by the decision in this case is binding on all courts of the State of Illinois. It does what this Court refused to do—overrule *Preston*—using this Court's decision in *Cooper* as the vehicle to effect that end.

CONCLUSION

Wherefore, for the foregoing reasons, this Petitioner prays that a Writ of Certiorari be issued to the Supreme Court of Illinois in this cause.

Respectfully submitted,

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Attorneys for Petitioner

APPENDIX

APPENDIX

OPINION OF THE SUPREME COURT OF ILLINOIS

Docket Nos. 41038, 41039 cons.—Agendas 17, 18—
January, 1968.

THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, *vs.* SAM LAWRENCE NUGARA, Appellant.—THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, *vs.* HAROLD SHUBMEHL, Appellant.

Mr. JUSTICE KLUCZYNSKI delivered the opinion of the court:

Defendants, Harold Shubmehl and Sam Lawrence Nugara, were indicted and jointly tried before a jury in the circuit court of Cook County for the crimes of attempted burglary and possession of burglary tools. Shubmehl was convicted on both charges and sentenced to the penitentiary from one to five years for the former charge and from one to two years for the latter, the sentences to run concurrently. Nugara was found guilty only on the attempted burglary charge and sentenced to the penitentiary from one to five years. Both appealed and said appeals have been consolidated for consideration. Shubmehl contends that the trial court erred in admitting evidence of burglary tools seized pursuant to an unlawful search and in excluding testimony of an expert witness. He also incorporates and adopts, where applicable, all other errors raised on appeal by Nugara, to-wit: that the evidence does not sustain his conviction, that testimony and products of an illegal search of his co-defendant's automobile were used against him to his prejudice, and "that there was an unlawful restriction of cross-examination, interference with the defense and frustration of the defense by the trial judge."

The fact were that at approximately 3:00 A.M., on November 7, 1964, Chicago police officers Wodnicki, Brooks and McCarthy, while patrolling in their unmarked car, observed the defendants standing, one in front and the other in the recessed entranceway of the Neumode Hosiery Shop at 54 West Madison Street in Chicago. Wodnicki testified that he jumped from the car as it slowed and ran to the entranceway where he saw Shubmehl facing the door of the hosiery shop with a screwdriver in his left hand, the tip of which was inserted into the part of the door where the lock cylinder had been removed. He promptly arrested Shubmehl, noticing, upon closer inspection, that there were striation marks and indentations on the casing of the cylinder lock and that although the cylinder was missing the door could not be opened until the bolt of the lock was moved. He conducted a brief search of the area around the door for the missing cylinder but failed to find it. In the meantime his fellow officers had arrested Nugara who had fled from in front of the entranceway to and down an adjacent stairway.

Both defendants were taken to Area One Burglary Unit Headquarters located at 56th and Cottage Grove. Enroute and upon arrival at the police station Wodnicki asked Shubmehl whether he had a car parked at the scene and each time Shubmehl denied having one. Wodnicki further testified, however, that he later said to Shubmehl, "You may as well tell us if you have a car, if you are driving one, because we'll find out, If the car is out on the street it will be towed, why go through the expense of having the car reclaimed. We'll take the car off the street, we'll reclaim the car and you can pick it up", and that Shubmehl then admitted having a '64 Ford with Michigan license plates parked south of Madison on Dearborn and gave him the keys. He stated that he then asked, "Do you have anything in the car?" to which Shubmehl replied, "No", and that he inquired further, saying, "You don't mind if we look around the

car?" and Shubmehl answered: "No, go ahead, look through the car." Thereafter, he returned to the Dearborn-Madison area, found the car, opened the trunk, and discovered a claw hammer, two screwdrivers and a pair of pliers.

These items were admitted into evidence at trial following denial of Shubmehl's motion to suppress wherein he denied giving any authorization to police officers to search his car. The remainder of the State's case consisted of the testimony of the arresting officers as well as testimony concerning the condition of the door of the hosiery shop at closing time on the evening before the arrest and the condition thereafter, and the screwdriver and bent nail files taken from Shubmehl's person upon arrest. In rebuttal, Shubmehl testified on his own behalf and, in substance, sought to offer an innocent explanation for his presence at the time and place of arrest; namely, that he had been drinking and stopped to relieve himself. He also attempted to introduce the testimony of an expert witness, a locksmith, concerning the possibility of removing the cylinder lock from the door with the aforementioned screwdriver and nail files but the court sustained the State's objection thereto.

In support of his contention that the burglary tools found in the trunk of his car should have been suppressed, Shubmehl argues that the search which uncovered these items was unlawful because it was not incident to his arrest, citing *Preston* v. *United States,* 376 U.S. 364, 11 L. Ed. 2d 777, 84 S. Ct. 881, nor knowingly consented to by him. We need not go beyond the first of these arguments to determine that the ultimate contention of error is unfounded and that the search was reasonable and not in violation of Shubmehl's rights. In the recent cases of *People* v. *Brown,* 38 Ill.2d 353, and *People* v. *Jones,* 38 Ill.2d 427, we considered the scope of *Preston* and similar cases in the light of *Cooper* v. *California,* 386 U.S. 58, 17 L. Ed. 2d 730, 87 S. Ct. 788, wherein a search of the

glove compartment of an automobile which had been impounded by the police was upheld despite the fact that the search occurred one week after the defendant had been arrested for a narcotics violation. On the strength of *Cooper* we felt free to consider the lawfulness of a search of an automobile even though it occurred after the owner was arrested and taken into custody, factors which a majority of this court, under the compulsion of *Preston*, had considered as invalidating the search *per se*. (See *People* v. *Lewis*, 34 Ill.2d 211, 215.) Accordingly, in *Brown* and *Jones* we proceeded to examine all the facts surrounding the arrest and search in making our determination of its legality. 38 Ill.2d at 358; at 431.

Using this same approach here, we note that Shubmehl's car was parked in the immediate proximity of the hosiery shop and had admittedly been used to transport him and his burglary tools to that location. Thus, in the instant case, as in *Cooper*, there is a close connection between the reason the defendant was arrested, *i.e.* attempted burglary of the shop, possession of burglary tools, and the reason his car was impounded and searched, *i.e.* to find additional tools or the missing lock cylinder. In view of these facts, we find that the search of Shubmehl's automobile was reasonable, notwithstanding the time which elapsed between his arrest and the search. Therefore, the admission of the seized items at trial was proper.

With respect to the court's exclusion of the testimony of Shubmehl's expert witness, it must be noted that the prosecution's case consisted primarily of the arresting officer's testimony concerning his observation of Shubmehl holding a screwdriver in his left hand, the point of which was inserted in the part of the door from which the lock cylinder had been removed. These facts alone are all that need be shown as proof of the crime of attempted burglary, an overt act implying an attempt to unlawfully enter a building containing personal property. (*People* v. *Johnson*, 28 Ill.2d 441.) The lock cylinder was

never found and the State never sought to establish that defendants were responsible for its removal. Therefore, expert testimony relative to the difficulty involved in removing the cylinder was not relevant to the proof of the crime charged and was properly excluded.

We turn now to the allegation of error relating solely to Nugara's appeal, that the evidence was insufficient to sustain his conviction for attempted burglary. The general rule in cases of this type is that "While mere presence and negative acquiescence is not sufficient to constitute a person a principal to a crime, one may aid and abet without actively participating in the overt act, and if the proof shows he was present at the crime without disapproving or opposing it, the trier of fact may competently consider this conduct with other circumstances and thereby reach a conclusion that such person assented to the commission of the criminal act, lent his countenance and approval, and was thereby aiding and abetting the crime." (*People* v. *Clark*, 30 Ill.2d 67, at 72; see also, *People* v. *Cole*, 30 Ill.2d 375; *People* v. *Washington*, 26 Ill.2d 207; *People* v. *Kolep*, 29 Ill.2d 116; *People* v. *Smith*, 391 Ill. 172.) Here, there was substantial evidence showing that Nugara was present at approximately 3:00 A.M. in the entranceway of the hosiery shop while his companion, in whose company he had been for several hours, attempted to burglarize it and that, upon discovery by the police, he then tried to flee the scene. In view of this evidence, it was quite reasonable for the jury to find that Nugara aided and abetted the criminal act of attempted burglary, and that finding will therefore not be disturbed on review.

Finally, the defendants, citing particular instances, allege that the court erroneously restricted cross-examination by Nugara's counsel. "As a general rule the latitude to be allowed in cross-examination of witnesses rests largely in the discretion of the trial court. Such cross-examination should be kept within fair and reasonable limits, and it is only in a case of clear abuse of such

discretion, resulting in manifest prejudice to the defendant, that a reviewing court will interfere. [Citations.]" (*People* v. *Halteman*, 10 Ill.2d 74, 86.) We will not set out the text of the colloquies wherein the court restricted Nugara's counsel since these quotations would unduly lengthen this opinion. Suffice it to say that we have examined the record, viewed the restrictions in the context in which they were made and find that no "manifest prejudice" was done the defendants by the trial court.

More specifically, we find no merit in defendants' claim that the trial court, by restricting the cross-examination of Shubmehl as to the number of drinks he had prior to his arrest, improperly foreclosed the defense of intoxication. The context within which the restriction occurred is most relevant to our ruling on its propriety. In substance, Shubmehl testified on direct that he and Nagura had been drinking in a number of taverns that evening, that he had weak kidneys and thus stopped in the recessed entranceway of the hosiery shop to relieve himself. Both on direct and cross-examination (by Nugara's counsel) the court sustained objections to questions concerning the number of drinks he and Nugara consumed on the evening in question, stating that intoxication was no defense to the crime charged. While this latter statement of law is incorrect, since by statute (Ill. Rev. Stat. 1963, chap. 38, par. 6—3) intoxication would be a valid defense to attempted burglary, it being a specific offense (see Ill. Rev. Stat. 1963, chap. 38, par. 8—4), the court's ruling did not operate to foreclose the defense of intoxication for the simple reason that neither defendant sought to raise that defense. The object of Shubmehl's testimony was to explain his presence at the scene of the arrest, not to establish a lack of mental state to commit the crime charged. Similarly, Nugara's only reference to drinking consisted of his counsel's attempted cross-examination of Shubmehl which cannot be equated with meeting the statutory prerequisite to presenting an affirmative defense of coming forward with evidence. (See

Ill. Rev. Stat. 1963, chap. 38, par. 3—2.) No offer of proof concerning intoxication was ever made; thus, defendants waived this defense at trial and may not now, for the first time, raise it on appeal.

For the foregoing reasons, the judgments of the circuit court of Cook County are affirmed.

Judgments affirmed.

Mr. JUSTICE WARD took no part in the consideration or decision of this case.

UNITED STATES OF AMERICA

State of Illinois } ss.
Supreme Court }

At a Term of the Supreme Court, began and held in Springfield, on Monday, the eleventh day of March in the year of our Lord, one thousand nine hundred and sixty-eight, within and for the State of Illinois.

Present: Roy J. Solfisburg, Jr., Chief Justice

Justice Walter V. Schaefer
Justice Byron O. House
Justice Thomas E. Kluczynski
Justice Ray I. Klingbiel
Justice Robert C. Underwood
Justice Daniel P. Ward

William G. Clark, Attorney General
Robert G. Miley, Marshal

Attest: Clell L. Woods, Clerk

Be It Remembered, that, to-wit: on the 28th day of March 1968, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said court, had and entered of record, to-wit:

People State of Illinois,
Appellee
No. 41038 vs.
Sam Nugara (Impleaded),
Appellant

Appeal from
Circuit Court
(Criminal Division)
65-980

And now, on this day, this cause having been argued by counsel, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the judgment aforesaid, is there anything erroneous, vicious or defective, and in that record there is no error.

Therefore, it is considered by the Court that the judgment of the Circuit Court of Cook County (Criminal Division) aforesaid, Be Affirmed In All Things And Stand In Full Force And Effect, notwithstanding the said matter and things therein assigned for error.

Clell L. Woods, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said court this 5th day of June 1968.

(Seal) /s/ Clell L. Woods
Clerk,
Supreme Court of the State of Illinois.

UNITED STATES OF AMERICA

State of Illinois } ss.
Supreme Court }

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the thirteenth day of May in the year of our Lord, one thousand nine hundred and sixty-eight, within and for the State of Illinois.

Present: Roy J. Solfisburg, Jr., Chief Justice

Justice Walter V. Schaefer
Justice Thomas E. Kluczynski
Justice Ray I. Klingbiel
Justice Robert C. Underwood
Justice Daniel P. Ward

William G. Clark, Attorney General
Robert G. Miley, Marshal
Attest: Clell L. Woods, Clerk

Be It Remembered, that, to-wit: on the 27th day of May, A.D. 1968, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said court, had and entered of record, to-wit:

People State of Illinois, Appellee Nos. 41038 41039 vs. Cons. Sam Nugara and Harold Shubmehl, Appellants	Appeal from Circuit Court Cook County (Criminal Division)

And now, on this day, the Court having duly considered the petition for rehearing filed herein, and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denied a rehearing in this cause.